Filed 2/28/12 P. v. Vargas CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MOSES VARGAS,

Defendant and Appellant.

F061565

(Super. Ct. No. F10900092)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Gregory Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Moses Vargas appeals from his conviction and sentence for first degree residential burglary (Pen. Code, §§ 459/460, subd. (a))[1] of his next-door neighbor's home while she was out of town on a work assignment. He raises two issues: 1) the trial court erred in declining to excuse a juror after the juror revealed he lived essentially across the street from the burglarized home and the defendant; and 2) the trial court erred in failing to strike a prior strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). For the reasons discussed below, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On December 20, 2009, the residence at 3635 Judy in Clovis was burglarized in an aggravated fashion, described by the first officer to the scene as "ransacked." Thousands of dollars of property was stolen, including televisions, jewelry, golf clubs, and items belonging to the government which the victim utilized in the course of her work as an agent of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, such as a ballistic vest. Clovis police investigators found a latent palm print on a shelving unit inside the residence, and matched it to appellant.

On January 6, 2010, Clovis police officers executed a search warrant on appellant's residence, located next door to the victim's home. They found numerous items belonging to the victim, including financial documents belonging to the victim and her family, and the ballistic vest.

Appellant was charged with first degree residential burglary with a further allegation of a prior serious felony conviction from 1996, which was also for first degree residential burglary. In November 2010, after a total of two days of trial, a jury found appellant guilty of the crime after approximately 45 minutes of deliberations. Appellant admitted the prior serious felony conviction. At sentencing, defense counsel made an oral *Romero* motion to strike the prior conviction, which the trial court impliedly denied

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

when it imposed the middle term, doubled as a second strike, plus a five-year enhancement pursuant to section 667, subdivision (a), for a total of 13 years.

Further relevant facts are provided in connection with the discussions below.

DISCUSSION

I.
THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO EXCUSE A JUROR FOR MISCONDUCT

Appellant asserts the trial court committed reversible error in permitting a juror to remain on the jury despite revelations during the trial that the juror lived across the street from the victim and appellant. Respondent disagrees. We conclude the juror did not commit misconduct, and thus the trial court properly decided not to excuse the juror.

Standard of Review

"Section 1089 authorizes the trial court to discharge a juror at any time before or after the final submission of the case to the jury if, upon good cause, the juror is 'found to be unable to perform his or her duty.' A trial court 'has broad discretion to investigate and remove a juror in the midst of trial where it finds that, for any reason, the juror is no longer able or qualified to serve.' [Citation.] A juror's inability to perform '"must appear in the record as a 'demonstrable reality' and bias may not be presumed." [Citations.]' [Citation.] We review the trial court's determination for abuse of discretion and uphold its decision if it is supported by substantial evidence. [Citation.]" (*People v. Bennett* (2009) 45 Cal.4th 577, 621.)

General Principles

"[T]he efficacy of voir dire is dependent on prospective jurors answering truthfully when questioned. As the United States Supreme Court has stated, '*Voir dire* examination serves to protect [a criminal defendant's right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for

cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.' [Citation.] [Fn. omitted.]" (*In re Hitchings* (1993) 6 Cal.4th 97, 110-111 (*Hitchings*).)

"A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct. [Citations.]" (*Hitchings*, *supra*, 6 Cal.4th at p. 111.) "'Although intentional concealment of material information by a potential juror may constitute implied bias justifying his or her disqualification or removal [citations], mere inadvertent or unintentional failures to disclose are not accorded the same effect. "[T]he proper test to be applied to unintentional 'concealment' is whether the juror is sufficiently biased to constitute good cause for the court to find under Penal Code sections 1089 and [former] 1123 that he is unable to perform his duty."' [Citations.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 823.) "Whether a failure to disclose is intentional or unintentional and whether a juror is biased in this regard are matters within the discretion of the trial court. Except where bias is clearly apparent from the record, the trial judge is in the best position to assess the state of mind of a juror or potential juror on voir dire examination. [Citations.]" (*People v. McPeters* (1992) 2 Cal.4th 1148, 1175 (*McPeters*), superseded by statute on other grounds as stated in *People v. Wallace* (2008) 44 Cal.4th 1032, 1087.)

Factual Background

During voir dire, the prospective jurors learned the alleged crime took place on or about December 20, 2009, and that appellant was the defendant. No mention was made of the street or area where the crime occurred.

In response to certain questions from the trial court during voir dire, Juror 15 expressly or impliedly provided the following information: he was not familiar with

anyone listed as a potential witness. He, nor any of his relatives, close friends, or significant others had been the victim of any crime.[2] Juror 15's sister-in-law had been arrested for a DUI four years prior, but he thought she was treated fairly and he could remain impartial. Juror 15 was a retired correctional sergeant with the County of Fresno and would be able to listen to the testimony of law enforcement officers and refrain from according them any greater weight than other witnesses. Juror 15 was from Clovis, married for 16 years, with one son, and described his and his wife's schooling and employment. He retired in 2008 and occupied his time with golf and fishing. He had nothing to say in response to the trial court's "catch-all" question.

Defense counsel informed the prospective jurors that the incident occurred in Clovis and asked whether the fact the alleged crime happened in Clovis affected anyone's ability to be fair. No one responded specifically to this question. No further geographical information as to the alleged crime was provided. Of the jurors eventually empaneled, two resided in Clovis, including Juror 15.

On the first day of trial - which consisted only of the morning of November 24, 2010, the neighborhood and then the specific address where the burglary took place were brought out from the first witness to take the stand. Also during that day, another witness testified as to the exact address of the victim's residence, and photographs of the neighborhood were introduced as evidence and published to the jury.

Before the second day of trial began, Juror 15 informed the court, "I know that this is a burglary case and the street where it happened at, I live on that street. I don't know the defendant. I don't know the victim. And after looking at the witnesses, I know two of them. Jaime Ortiz, that is the way I read it, his actual name is Jamie, I know who he is. He lives directly across the street from me. And I know Mark Walker. And I know

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[2] Of the 12 jurors eventually empaneled, six had personally been victims of residential burglaries.

Jaime better than I do Mark. I have only said hi to Mark. But I just want to bring that to the Court's attention."

The trial court inquired further as to any potential bias or impact Juror 15's knowledge of the neighborhood and the potential witnesses might have on his ability to be impartial. Juror 15 responded that his familiarity with the location would have no bearing on his impartiality, and he would not give any greater weight to the witnesses he knew if they testified.

Defense counsel raised his concerns about Juror 15 remaining on the jury, given that the evidence thus far presented had focused on location, and that Juror 15 lived essentially across the street from the victim's residence. The trial court agreed to question Juror 15 further about his awareness and knowledge of the actual burglary. Juror 15 admitted he became aware of the burglary on that date, at about 8:00 p.m., because his wife had told him there was a lot of activity outside. He went out to take a look, saw patrol cars, and overheard Mark Walker taking about a burglary and the house being ransacked. After seeing the Clovis Police Department had the situation under control, he returned inside. The police initially responded to the scene at 6:30 p.m. Juror 15 also admitted that he first realized his possible connection early in the first day of witness testimony, and then continued to confirm his suspicions as the proceedings continued.

In response to the trial court's inquiry about his impartiality, Juror 15 stated: "Burglaries happen all the time. It just happened to be in my neighborhood. I don't know the victim. I don't know the defendant. And that is all I can say. That is all I feel. I feel that I can be fair."

Defense counsel suggested to the court Juror 15 be removed, but his argument raised no legal basis such as a suggestion Juror 15 was unable to perform his duties, nor cited any evidence of Juror 15's actual bias.

The trial court concluded the issue in the case was not whether a burglary had occurred, but whether appellant had anything to do with it. He found that it appeared Juror 15 "would have no difficulty viewing the evidence and determining whether [appellant] had anything to do with it.… [¶] [Juror 15] at no time said he would not be able to listen to the evidence and make a determination along with the other 11 jurors who will deliberate on this case.… If other information develops, then the Court will reconsider. But I have not heard enough to suggest that he should be removed based on any showing that he would be unavailable to fill his obligation as a juror pursuant to his oath … to evaluate the evidence impartially and reach a just verdict."

The two potential witnesses Juror 15 was familiar with were never called to the stand.

Analysis

This court has addressed unintentional concealment of facts during voir dire in the past, relying primarily on *People v. Jackson* (1985) 168 Cal.App.3d 700, 705-706 (*Jackson*), to find unintentional concealment does not constitute juror misconduct. (*People v. Kelly* (1986) 185 Cal.App.3d 118.) In *Kelly*, the defendant was tried and convicted of 17 counts of various sex crimes. On appeal, he contended he was denied a fair trial because one of the jurors failed to disclose during voir dire that she had been sexually approached as a child by a stepuncle. (*Id.* at p. 120.) Following the reasoning of *Jackson*, discussed below, we concluded there was no misconduct because, among other reasons, the juror's nondisclosure was unintentional, and the trial court conducted an adequate inquiry to determine if the juror was biased, noting that the juror had clearly denied any bias or impropriety. (*Kelley, supra*, at pp. 128-129.)

In *Jackson*, the underlying offense was possession of marijuana for sale. (*Jackson, supra*, 168 Cal.App.3d at p. 702.) During voir dire, defense counsel asked a "catch-all" question of the prospective jury members to tease out anything in their backgrounds that might raise a red flag, describing it as a "skeleton in the closet"

question. (*Ibid.*) The defendant contended the trial court erred in failing to excuse a juror when the juror sent the court a note on the third day of jury deliberations revealing that he had a "skeleton" in his closet: his nephew had died from drug-related reasons (an overdose) 12 to 14 years prior. The juror noted it would not influence his decision one way or the other, and that "'I just remembered it.'" (*Id.* at p. 703.) The trial court noted the juror was conscientious in bringing this fact to the court's attention, and declined a defense suggestion to excuse the juror. The *Jackson* court upheld the trial court's decision, noting the juror stated his decision would not be affected and "the court drew the reasonable inference that the juror was only coming forward because he was conscientious in his duty." (*Id.* at p. 706.)

In *McPeters*, our Supreme Court upheld the trial court's decision to keep a juror in place notwithstanding his initial failure during voir dire to disclose that he knew the victim's husband, whose name was read out as a possible trial witness. (*McPeters*, *supra*, 2 Cal.4th at p. 1174.) The juror subsequently came forward before opening statements were delivered, and notified the court and parties that he might be acquainted with the victim's husband in connection with a real estate transaction the juror had just closed. Defense counsel objected to the juror's continued service, but was unable to articulate a specific legal basis for the objection. The trial court questioned the juror further and found that the juror had no bias, express or implied, and would be a fair and impartial juror. (*Id.* at pp. 1174-1175.) The *McPeters* court concluded, "the trial court did not abuse its discretion in finding [the juror's] nondisclosure to be inadvertent and, further, in finding no express or implied bias on his part. In the context of voir dire examination, it is conceivable a juror might not immediately remember the name of a real estate agent with whom he had recently dealt or recognize the agent's name on a long list of witnesses. Notwithstanding his contact with [the victim's husband], which in any event was brief and not naturally or inevitably productive of bias, [the juror] affirmed his belief he could be fair and impartial. His candid disclosure of the contact even before the trial

began further supports his determination to be a fair and impartial juror. Under these circumstances, neither defendant's Sixth Amendment rights nor his rights under section 1089 were infringed." (*Id.* at p. 1175.)

Here, Juror 15 was similarly conscientious, bringing up his connection to the location of the crime soon after realizing it, after the first half day of the trial, and before the second day's proceedings had begun. It is similarly conceivable here that Juror 15 might not immediately register his familiarity with Mark Walker, as someone he merely said "hi" to on occasion, and would take the witness list on its face as listing one Jaime Ortiz, rather than thinking the witness list actually meant to read Jamie Ortiz. Juror 15 had gone out to briefly observe the police activity the date of the burglary approximately ninety minutes after the police had arrived. With the exception of overhearing neighbor Mark Walker say that a burglary had taken place and the house was ransacked, Juror 15 made no indication he had any interaction with any neighbors, witnesses, law enforcement, or the crime in question that demonstrated bias. The victim and appellant had both lived in the neighborhood approximately two years and Juror 15 knew neither of them. Even though appellant was his neighbor from across the street, neither appellant nor Juror 15 recognized each other during voir dire. Moreover, during voir dire, the prospective jurors were not provided the address or neighborhood where the crime took place, and were questioned only as to themselves or close friends or relatives being the victims of crimes or having contact with law enforcement. Juror 15 committed no misconduct in failing to bring to the court's attention earlier that he resided on the same street as the burglarized residence. His "concealment" was unintentional, and he brought the relevant facts to light early in the proceedings on his own initiative. Substantial evidence supports the trial court's finding that Juror 15 committed no misconduct and would be able to remain impartial. The trial court properly declined to excuse Juror 15.

II.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S *ROMERO* MOTION

Appellant next asserts the trial court erred in failing to strike his prior strike conviction for purposes of applying the Three Strikes law. He appears to assert the trial court failed to consider appropriately his nature in that he is not a career criminal contemplated by the Three Strikes law. Respondent asserts the trial court had no discretion to strike the prior, citing to section 1385, subdivision (b) (section 1385(b)). Appellant responds by pointing to the discussion in *Romero, supra*, 13 Cal.4th at pages 525-528 rejecting the district attorney's argument that section 1385(b) bars a court from striking prior felony allegations in Three Strikes cases. We agree with respondent and *Romero* that section 1385(b) does not remove the trial court's discretion to strike a prior strike, but conclude the trial court properly denied appellant's *Romero* motion because he does not fall outside the spirit of the Three Strikes law given the nature of the offense and his personal history.

Standard of Review

A trial court's discretion to strike prior felony conviction allegations is limited to those instances "in furtherance of justice." (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at p. 530.) Exercise of such discretion is subject to review for abuse. (*Romero, supra*, at p. 530.) A court's refusal to strike a prior conviction allegation is also subject to review under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) "[A] trial court does not abuse its discretion unless its [sentencing] decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at p. 377.)

Furthermore, the Three Strikes law "creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony, supra*, 33 Cal.4th at p. 378.) Thus, a court abuses its discretion in failing to strike a prior felony conviction allegation in only limited circumstances, such as when it

was not aware of its discretion to dismiss, considered impermissible factors in declining to dismiss, or failed to correct an arbitrary, capricious or patently absurd result of application of the Three Strikes law under the specific facts of a particular case. (*Ibid.*)

In considering a defendant's invitation to strike a prior felony conviction allegation, both the trial court and the reviewing court, "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part …." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The purpose of the Three Strikes law is expressly set forth within its provisions: "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (§ 667, subd. (b); see *People v. Strong* (2001) 87 Cal.App.4th 328, 338.) Accordingly, "extraordinary must the circumstance be by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack." (*Strong*, *supra*, at p. 338.) "[T]he circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Carmony*, *supra*, 33 Cal.4th at p. 378.)

The Trial Court's Findings

The trial court discussed the nature and circumstances of appellant's prior felony conviction. It noted appellant's previous narcotics experience, his rehabilitation, and his more recent relapse. The court pointed out the nature and circumstances of the current offense, and noted appellant's numerous convictions of increasing seriousness. The trial

court noted a mitigating factor in sentencing appellant was the fact he had not served a term in prison,[3] and had appeared to do well on probation previously. The trial court then imposed the middle term, doubled pursuant to the Three Strikes law, and added the five-year enhancement for the prior serious felony under section 667, subdivision (a).

Analysis

We fail to find the extraordinary circumstances required to place appellant outside the spirit of the Three Strikes scheme here. According to the probation officer's report, which the trial court reviewed, appellant's criminal history is lengthy -- extending back to 1990 -- and demonstrates increasing violence and seriousness until his prior serious felony conviction in 1996, where he forced his way into the victims' residence and assaulted their son and punched an adult female in the face. Thereafter, he has three instances of driving on a suspended license (Veh. Code, § 14601.1, subd. (a)), though his attorney noted appellant did not seek a driver's license in the first place, and another conviction for failure to provide (§ 270). Moreover, as a result of his guilty conviction in this case, the People dismissed a pending unrelated drug charge concerning events that took place on January 2, 2010, where appellant was pulled over without a driver's license and police officers recovered 1.6 grams of methamphetamine and a glass pipe from his car. At sentencing, appellant admitted he had a drug problem while attempting to convince the trial court he should receive a drug-rehabilitation-focused sentence rather than a lengthy prison sentence.

Furthermore, as to the nature of the offense, the scene of the burglary was described by multiple witnesses as "ransacked," with furniture and other property destroyed. Thousands of dollars of property was taken, and much of it was never recovered. He violated a position of trust as the victim's next-door neighbor. He refused

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[3] In connection with appellant's 1996 conviction, he received probation, as well as a "diagnostic" where he was exposed to state prison for a short period of time.

to admit his involvement, testifying the police framed him or implying other members of his household committed the crime and stored the property in his house unbeknownst to him.

"Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) The record before us demonstrates the court understood its discretionary authority and weighed the competing facts to reach a reasonable conclusion in conformity with the spirit of the law. After evaluating the entirety of that information, the court drew its ultimate conclusion and declined to exercise its discretion to strike the prior. In view of these facts and circumstances, appellant has failed to show this was an irrational or arbitrary exercise of discretion.

DISPOSITION

The judgment is affirmed.

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Franson, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Cornell, J.